

**PUBLIC INTEGRITY COMMISSION
MINUTES
March 20, 2018
10:00 A.M.**

1. Call to Order: 10:15 a.m. Present: William F. Tobin, Jr. (Vice-Chair; acting Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Andrew Gonser, Esq.; Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for February 20, 2018: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved.

3. Administrative Items

- A. Conclusion of 2017 Financial Disclosure filings—366 filed, 5 delinquent
- B. New Commissioner(s) to be appointed at the end of March
- C. Tablets—have been ordered but not received
- D. Annual Report—posted on the website
- E. Candidate Financial Disclosure filings—creates additional workload, 25 extra accounts so far this year.
- F. Upcoming Trainings:
 - 1. April 11—State OMB
 - 2. April 16—State Racing Commission
 - 3. May 14—City of Dover Employees
 - 4. May 24—City of Dover Employees
 - 5. June 1—Delaware League of Local Governments
 - 6. June 5—City of Dover Employees
 - 7. June 7—City of Dover Employees
 - 8. June 20—DHSS
 - 9. June 26—City of Dover Council
 - 10. July 19—State OMB
- G. Goodbye and thank you to Commissioner Anderson

4. Motion to go into Executive Sessionⁱ to hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved.

5. 18-11—Private Interest

State Employee's request for an advisory opinion was withdrawn the day prior to the meeting. She decided to resign from her State position.

6. 18-13—Post Employment (no appearance)

The matter was reported anonymously to the State Auditor's Office who then referred the matter to the Commission. The reporting person did not file a formal complaint. The letter alleged that [a former Employee] was violating the post-employment restriction in the Code of Conduct by contracting with three Delaware [State agencies] but did not elaborate further.

[The Employee worked for the State from 2011-2017. In 2017, he moved out-of-state to accept a position similar to the one he held in Delaware].

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

Generally, to determine if there is substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. However, there were not enough facts in the letter to adequately determine if [Employee] was contracting with Delaware [agencies] and if so, whether his contract work overlapped with his previous State duties.

The question considered was what course of action the Commission should pursue? [Employee] was no longer working in Delaware. As a result, an administrative penalty would not be a suitable remedy if it was discovered that [Employee] was in violation of the post-employment restriction. Violations of 29 Del. C. § 5805(d) are subject to a criminal penalty of “not more than one year in prison and by a fine not to exceed \$10,000.” 29 Del. C. § 5805(f)(1). The Commission is authorized to refer matters to the Attorney General’s (“AG”) office when there is substantial evidence of a criminal violation. 29 Del. C. § 5809(4). However, the Commission decided it was very unlikely that the AG’s office would pursue the case given the fact that [Employee] lived out-of-state. Another option would be for the Commission to generate a Complaint on its own initiative. 29 Del. C. § 5810(a). Thereafter, assuming the Complaint

was found to adequately allege a violation of the Code of Conduct, the matter would be set down for a formal hearing. The end result of the formal hearing would likely be a referral of the matter to the Attorney General's office.

Based on the lack of information in the anonymous letter and the inability to impose a meaningful penalty, if necessary, the Commission decided to dismiss the matter.

Dismissed. Moved—Commissioner Gonser; seconded—Commissioner Anderson. Vote 4-0, approved.

7. 18-10—Post Employment

[Employee] worked for [a State agency]. [His job duties and assignments have been excluded to ensure the confidentiality his advisory opinion]. [Employee] oversaw the work of other staff and developed their performance plans and evaluated their performance. [Employee] was retiring from State service on April 1, 2018.

[Employee] obtained part-time employment [with one of his agency's vendors]. His job duties and assignments were different than those he performed while working for the State].

[Employee] asked the Commission to decide if his new position would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local

Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency's] workers who left State employment to work for one of the agency's contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

[Employee]'s new job duties were not similar to his State job duties and he had not previously worked on the [specific] project. [Employee] would be summarizing the reports of other employees and filing the information with [his former agency]. When asked by the Commission if he would be required to have contact with [agency] employees, [Employee] stated that if so, his contact would be limited to electronic contact with an occasional phone call.

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

No conflict. Moved—Commissioner Anderson; seconded Commissioner Gonser. Vote 4-0, approved.

8. Motion to go out of Executive Session: Moved--Commissioner Whetzel; seconded—Commissioner Anderson. Vote 4-0, approved.

9. Motion to return to Executive Session: Moved—Commissioner Anderson; seconded—Commissioner Tobin. Vote 4-0, approved

10. Discussion of Complaints Pending

PIC received two Complaints about [local officials] members. They could not be placed on the March agenda because a Commissioner needed to recuse. As a consequence, the Commission did not have the required quorum to consider the matters. Those matters will be placed on the agenda for April, assuming we have enough Commissioners for a quorum.

11. Motion to go out of Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved.

12. Adjournment: Next meeting April 17, 2018.

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.